U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on the petitioner's motion to reconsider.[1] The motion will be dismissed as untimely, the appeal will remain dismissed, and the petition will remain denied.

A petitioner must file a motion to reconsider within 30 days of the unfavorable decision. 8 C.F.R. § 103.5(a)(1)(i). If the decision was mailed, a petitioner must file a motion within 33 days. 8 C.F.R. § 103.8(b). U.S. Citizenship and Immigration Services (USCIS) may excuse a late-filed motion to reopen where the petitioner demonstrates that the delay was reasonable and beyond its control. 8 C.F.R. § 103.5(a)(1)(i). But USCIS lacks authority to excuse a late-filed motion to reconsider. *Id.*

A motion's filing date is its actual date of receipt at the location designated for filing. 8 C.F.R. § 103.2(a)(7)(i). A petitioner must sign a motion and submit it with the correct fee. *Id.*

The AAO affirmed the director's conclusion that the petitioner failed to demonstrate the beneficiary's qualifying experience for the offered position of systems administrator and dismissed the appeal on August 2, 2013. The AAO properly notified the petitioner that it had 33 days to file a motion. The petitioner filed the Form I-290B, Notice of Appeal or Motion, on September 5, 2013, or 34 days after the decision was issued. Accordingly, the motion to reconsider is untimely.

Even if the motion was timely, the AAO would have dismissed it for failing to meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4) ("A motion that does not meet applicable requirements shall be dismissed.") A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that USCIS based its decision an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3).

In the instant case, the petitioner's Form I-290B, Part 3. Basis for the Appeal or Motion, states:

> This is a motion to reopen and reconsider the denial issued by the AAO. The AAO incorrectly applied the law. In addition, we will be submitting new evidence based on the conclusions drawn by the AAO in the denial.

---

[1] Part 2 of the Form I-290B, Notice of Appeal or Motion, states that the petitioner is filing an "appeal," with a brief and/or additional evidence to follow within 30 days. The AAO, however, lacks authorization to review its own decisions on appeal. *See* U.S. Dep't of Homeland Sec. Delegation No. 0150.1, par. (2)(U), Mar. 1, 2003 (authorizing USCIS to adjudicate only the appeals previously stated in the former regulation at 8 C.F.R. § 103.1(f)(3)(iii) (2002)). Because the AAO cannot review its own decisions on appeal and the petitioner does not submit any documentary evidence of new facts as a motion to reopen requires, *see* 8 C.F.R. § 103.5(a)(2), the AAO treats the petitioner's filing as a motion to reconsider, as characterized by counsel in his cover letter of October 3, 2013.

We will submit a brief to the AAO within 30 days.

Neither the Form I-290B nor counsel's accompanying letter state reasons for reconsideration or cite any precedent decisions to establish that the AAO based its decision on an incorrect application of law or policy.

On October 2, 2013, counsel submitted a brief in support of the motion, stating reasons for reconsideration and citing pertinent precedent decisions. But USCIS regulations do not permit a petitioner to submit a brief within 30 days of filing a motion. The instructions to Form I-290B, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow a petitioner to submit a brief within 30 days of filing an appeal. But the form's instructions do not similarly allow the submission of a brief after filing a motion. The October 2, 2013 submission did not include any documentary evidence of new facts to support a motion to reopen.

Even if the motion was timely and properly filed, the petitioner has failed to establish that the AAO incorrectly applied law or policy. The petitioner asserts that it demonstrated the beneficiary's qualifying experience for the offered position and that the AAO improperly applied U.S. Department of Labor (DOL) regulations in finding otherwise.

A petitioner must establish that a beneficiary possessed all the education, training, and experience specified on the ETA Form 9089, Application for Permanent Employment Certification (labor certification), as of the petition's priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In determining the minimum job requirements of an offered position, USCIS must examine the job offer portion of the labor certification. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of systems administrator requires a U.S. bachelor's degree or a foreign equivalent degree in computer science, engineering, or a related field, plus 60 months of experience in the job offered or any related occupation.

On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience: about 25 months as a system/network architect with [redacted] from the issuance of the beneficiary's foreign equivalent degree on September 21, 2006 to October 31, 2008; about 23 months as a system & network administrator with [redacted] from November 1, 2008 to September 30, 2010; and more than 12 months of experience in the offered position with the petitioner in the United States from October 4, 2010 until the petition's priority date of May 17, 2012.

The petitioner submitted letters from itself and the beneficiary's former employers, verifying his experience pursuant to the regulation at 8 C.F.R. § 204.5(g)(1). Counsel argues that the petitioner has

demonstrated the beneficiary's qualifying employment experience because it has shown that he possessed at least 60 months of qualifying experience before the petition's priority date.

The AAO, however, found that the petitioner could not rely on the beneficiary's experience with it to establish his qualifying experience. The AAO cited the DOL regulation at 20 C.F.R. § 656.17(i)(3), which bars an employer from requiring U.S. workers to possess more experience than the beneficiary had at his time of hire, unless the employer demonstrates that it is no longer feasible to train a worker to qualify for the position or that the beneficiary gained the experience while working for the employer in a position that was not "substantially comparable" to the offered position.

Counsel notes that the petitioner stated on the ETA Form 9089, Part J.21, that the beneficiary did not gain any qualifying experience with the petitioner in a "substantially comparable" position. He asserts that the AAO misinterprets the meaning of the term substantially comparable position, which 20 C.F.R. 656.17(i)(5)(ii) defines as a "position requiring performance of the same job duties more than 50 percent of the time."

Although the beneficiary gained his experience with the petitioner performing the same job duties as the offered position, counsel argues that the beneficiary's experience would not be in a "substantially comparable" position if his current position requires him to spend different percentages of time than the offered position on those duties. For example, under the DOL regulations, if the beneficiary spent 60 percent of his time performing job duties 1 to 5 and 40 percent of his time on job duties 6 to 10, counsel asserts that the beneficiary's position would not be substantially comparable to the offered position if it required 40 percent of its time to be spent on job duties 1 to 5 and 60 percent of its time on job duties 6 to 10.

As indicated in the AAO's decision, the AAO has authority to apply the DOL regulations at 20 C.F.R. § 656.17(i) because: section 204(b) of the Act, 8 U.S.C. § 1154(b), authorizes USCIS to investigate the facts of a petition and to determine a beneficiary's qualifications for the requested classification; case law prohibits USCIS from ignoring terms of the labor certification, *see Irvine*, 699 F.2d at 1009, *Madany*, 696 F.2d at 1015; and the DOL regulation at 20 C.F.R. § 656.31, which authorizes USCIS to invalidate labor certificates upon findings of fraud or misrepresentation of material facts, allows USCIS to determine the truthfulness of an employer's representations on an ETA Form 9089.

Counsel's interpretation of a "substantially comparable" position differs from the DOL's interpretation of the term. The Board of Alien Labor Certification Appeals (BALCA) has found that a position that is not substantially comparable must require different job duties than the offered position and that those different duties must entail more than 50 percent of the position's performance time. *See Matter of Intelectric, Inc.*, 2011-PER-00060, 2012 WL 787472 *4 (BALCA Mar. 7, 2012) (the beneficiary's positions were not "substantially comparable" where his experience with the employer required performance of duties different than those of the offered position 80 percent of the time); *Matter of Dibon Solutions*, 2011-PER-00031, 2012 WL 70186 *2 (BALCA Jan. 4, 2012) (a list of identical job duties of the offered position and the beneficiary's work experience with the employer "clearly fails to establish that the [offered position] requires the same job duties as the Alien's current position less than

50 percent of the time."). Although BALCA's decisions do not bind USCIS, they bind the DOL, which is the agency authorized to interpret the regulation.

Moreover, even if counsel correctly interprets the term "substantially comparable" position, the petitioner has not met its burden of proof. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (a petitioner bears the burden of establishing eligibility for the requested benefit in immigrant visa proceedings). The petitioner has not submitted any evidence that the beneficiary's current position with the petitioner requires the performance of duties that differ in percentages of time from the offered position. Therefore, the AAO would not approve the petition even if the petitioner's motion was timely and properly filed.

Because the petitioner's motion to reconsider was untimely, the AAO must dismiss it. *See* 8 C.F.R. §§ 103.5(a)(1)(i),(4).

ORDER: The motion is dismissed.